IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS; BORDER NETWORK FOR HUMAN RIGHTS, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.* Defendants.	Case No. EP-19-CV-66-DB

MEMORANDUM IN SUPPORT OF THE GOVERNMENT'S CROSS-MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND A PRELIMINARY INJUNCTION

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INTRODUCTION

On February 15, 2019, the President issued a proclamation declaring that a national emergency exists at the southern border. *See* Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 2019 WL 643819, at *1 (Feb. 15, 2019) ("Proclamation"). The situation at the southern border places a tremendous strain on the limited resources of the Department of Homeland Security (DHS), exacerbating risks to border security, public safety, and the safety of the migrants themselves. *See* Letter from Secretary of Homeland Security Kirstjen M. Nielsen to Members of Congress (Mar. 28, 2019) (Nielsen Letter) (Ex. 1). Facilities are overcrowded, officers are stretched thin, and resources are being redirected away from law enforcement to address this humanitarian and security crisis. *Id.* In May 2019, over 132,887 people were apprehended between ports of entry on the southern border, compared with 99,304 in April and 92,840 in March. *See* DHS Sw. Border Migration Statistics FY 2019, at 2 (dated June 5, 2019) (Ex. 2); *see also* U.S. Customs & Border Protection Announces May 2019 Migration Statistics (Ex. 3).

The Government has been building barriers along the southern border since the 1990s pursuant to congressional authorization. To address the current national emergency at the southern border, three statutory authorities and sources of funding have been identified to continue the construction of additional barriers, in addition to the $1.375 billion recently appropriated by Congress for such construction: (1) the Treasury Forfeiture Fund (31 U.S.C. § 9705); (2) the Department of Defense's (DoD) counter-drug support authority (10 U.S.C. § 284); and (3) the authority to spend unobligated military construction funds to undertake military construction projects necessary to support the use of the armed forces in response to a national emergency (10 U.S.C. § 2808). Plaintiffs El Paso County and Border Network for Human Rights (BNHR) challenge the Proclamation and the Government's reliance on these authorities.

The Proclamation follows a 40-year tradition of multiple Presidents of both parties declaring

national emergencies to address a wide range of problems. Indeed, many of the declarations concerned situations that did not involve unforeseen circumstances or call for immediate action on the part of the federal government. Thus, for example, President Obama declared a national emergency to address "political repression" in Burundi, Exec. Order No. 13712, 80 Fed. Reg. 73633 (Nov. 23, 2015); President George W. Bush declared a national emergency to address the "fundamentally undemocratic March 2006 elections" in Belarus, Exec. Order No. 13405, 71 Fed. Reg. 35485 (June 16, 2006); and President Clinton declared a national emergency because "the Government of Burma has committed large-scale repression of the democratic opposition in Burma," Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 22, 1997). And Presidents similarly have used this power to address longstanding problems, such as when George H.W. Bush declared a national emergency in 1990 to address the "proliferation of chemical and biological weapons" around the world. Exec. Order No. 12735, 55 Fed. Reg. 48587 (Nov. 16, 1990). President Trump's Proclamation concerning the national emergency at our Nation's southern border is neither unprecedented nor fundamentally different from past uses of the same authority, and is in fact more closely tied to exigent circumstances.

As a threshold matter, Plaintiffs' challenge to the President's decision to declare a national emergency on the southern border is not subject to judicial review. Judicial review of the Proclamation is not available under the National Emergencies Act (NEA), and in any event such challenges raise political questions the judiciary is not equipped to answer, as courts overwhelmingly have recognized. Independent separation-of-powers concerns also require dismissal of the President as a defendant because there is no cause of action against the President, and Plaintiffs may not obtain equitable relief directly against the President for his official conduct, where, as here, the relief Plaintiffs seek could be provided by subordinate agency officials. And since the ultimate exercise of power under an emergency declaration is channeled by the statutory requirements of § 2808, there is no concern in this case that the NEA runs afoul of the non-delegation doctrine.

Plaintiffs also lack standing to challenge the Proclamation or the Government's use of construction authorities. Plaintiffs' challenge to DoD's use of its § 2808 authority is premature because DoD has not yet decided to undertake or authorize any barrier construction projects pursuant to § 2808.[1] They have no standing to challenge funding transfers under § 8005 of the 2019 DoD Appropriations Act. And neither plaintiff can show a redressible injury-in-fact caused by either the Proclamation or the sole § 284 project slated for the El Paso Sector.

Even if Plaintiffs' statutory claims were justiciable, they fail on the merits for numerous reasons. With respect to § 2808, Plaintiffs' APA claims fail because there is no final agency action, and any such action would be committed to agency discretion by law. Plaintiffs' APA claims for violations of § 284, § 2808, and § 8005 also fail because the plaintiffs' interests fall outside the zone of interests of those provisions. And Plaintiffs have failed to show a violation of the statutes they invoke, or any arbitrary and capricious agency action, that would support their APA claims.

In addition, Plaintiffs' constitutional claims are meritless. Defendants are relying on express congressional authorization to fund border construction, not the President's independent Article II authority. Plaintiffs' efforts to reframe alleged statutory violations as violations of the constitution contravene the principle that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

Accordingly, the Court should deny Plaintiffs' motion for summary judgment or a preliminary injunction, and either grant the Government's motion to dismiss the First Amended Complaint or award summary judgment to the Government on all counts.

[1] Once a § 2808 decision is made, the Government will notify opposing counsel about the decision, at which juncture the parties can determine if any modifications to the briefing schedule are needed to address § 2808 on the merits.

BACKGROUND

I. Congress's Authorization of Border Barrier Construction

Congress has repeatedly authorized the construction of border barrier infrastructure to prevent illegal entry of people and contraband. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, Div. C., Title I § 102(a), 110 Stat. 3009 (1996), as amended (codified at 8 U.S.C. § 1103 note). Congress amended IIRIRA on three occasions to expand the Government's authority to construct barriers along the southern border. In 2005, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306 (2005), which authorized the Secretary of Homeland Security to "to waive all legal requirements" that, in the "Secretary's sole discretion," are "necessary to ensure expeditious construction" of barriers and roads. *Id.* § 102(c)(1). The following year, Congress again amended IIRIRA as part of the Secure Fence Act of 2006, requiring construction of "physical barriers, roads, lights, cameras, and sensors" across hundreds of miles of the southern border in five specified locations, including "from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas." Pub. L. No. 109-367, § 3, 120 Stat. 2638 (2006). In 2007, Congress expanded this requirement and directed "construct[ion of] reinforced fencing along not less than 700 miles of the southwest border." Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V § 564, 121 Stat. 2090 (2007).

Relying on these authorities, the Department of Homeland Security (DHS) has installed 650 miles of vehicle and pedestrian barriers along the southern border since 1996.[2] *See* S. Appropriations Hr'g on the DHS FY 2018 Budget, 2017 WL 2311065 (May 25, 2017) (Testimony of then-Secretary of Homeland Security John Kelly). These efforts have been subject to diverse legal challenges, but courts have uniformly dismissed every lawsuit. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1215 (9th Cir. 2019); *N. American Butterfly Ass'n v. Nielsen*, 2019 WL 634596 (D.D.C. Feb. 14, 2019); *Cty. of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. 2008), *cert. denied*, 557 U.S. 915 (2009).

II. DHS's Recent Efforts to Expedite Border Barrier Construction

On January 25, 2017, the President issued an Executive Order directing federal agencies "to deploy all lawful means to secure the Nation's southern border." Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). The Order required that agencies "take all appropriate steps to immediately plan, design and construct a physical wall along the southern border," including "[i]dentify[ing] and, to the extent permitted by law, allocat[ing] sources of Federal funds" to that effort. *Id.* at 8794. In furtherance of this directive, DHS has expedited border barrier projects in the El Paso region. *See, e.g.*, Determination Pursuant to Section 102 of IIRIRA, 84 Fed. Reg. 17185–87 (Apr. 24, 2019) (construction in New Mexico portions of the El Paso Sector).

III. Congress's Authorization for U.S. Military Support of DHS's Border Security Efforts

Congress also has expressly authorized the U.S. military to provide a wide range of support at the southern border, including the "construction of roads and fences and installation of lighting to

[2] The Court may consider facts outside the complaint on a motion to dismiss without converting the motion into a motion for summary judgment when the facts are subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). "[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007).

block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. §§ 271-284; *see also id.* §§ 371–374. Since the early 1990s, military personnel have supported civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational organized crime and other transnational threats. *See* H. Armed Servs. Comm. Hr'g on S. Border Defense Support (Jan. 29, 2019) (Joint Statement of John Rood, Under Secretary of Defense for Policy, and Vice Admiral Michael Gilday, Director of Operations for the Joint Chiefs of Staff) (Joint Statement of Rood and Gilday) (Ex. 4). Presidents George W. Bush and Barack Obama both deployed military personnel to the southern border to support DHS's security efforts. *Id.*

For decades, U.S. military forces have played an active role in barrier construction and reinforcement during their deployments to the southern border. Military personnel were critical to construction of the San Diego border barrier in the early 1990s as well as other border fence projects. *See* H.R. Rep. No. 103-200, at 330–31 (1993) (commending the Department of Defense's Joint Task Force 6 for its role in construction of the San Diego primary fence); Hr'g Before the S. Comm. On Armed Servs. Subcomm. On Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Test. of Barry R. McCaffrey, Dir. of the Office of Nat'l Drug Control Policy) (military personnel constructed over 65 miles of barrier fencing). In 2006, National Guard personnel improved the southern border security infrastructure by building more than 38 miles of fence, 96 miles of vehicle barrier, and more than 19 miles of new all-weather road, and performing road repairs exceeding 700 miles. *See* Joint Statement of Rood and Gilday. More recently, the U.S. Army Corps of Engineers has assisted DHS by providing planning, engineering, and barrier construction support. *See, e.g.*, *Gringo Pass, Inc. v. Kiewit Sw. Co.*, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

IV. DoD's Current Support for DHS's Efforts to Secure the Southern Border

Building on this decades-long practice, on April 4, 2018, the President issued a memorandum to the Secretary of Defense, Secretary of Homeland Security, and the Attorney General titled,

"Securing the Southern Border of the United States." *See* Presidential Memorandum, 2018 WL 1633761 (Apr. 4, 2018). The President stated "[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border" and pointed to the "anticipated rapid rise in illegal crossings," as well as "the combination of illegal drugs, dangerous gang activity, and extensive illegal immigration." *Id.* The President determined the situation at the border had "reached a point of crisis" that "once again calls for the National Guard to help secure our border and protect our homeland." *Id.* To address this crisis, the President directed the Secretary of Defense to support DHS in "securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country." *Id.* The President also directed the Secretary of Defense to request the use of National Guard personnel to assist in fulfilling this mission. In October 2018, the President expanded the military's support to DHS to include active duty military personnel. *See* Joint Statement of Rood and Gilday. Over the course of the last year, military personnel have provided a wide range of border security support to DHS, including hardening U.S. ports of entry, erecting temporary barriers, and emplacing concertina wire. *See id.*

V. The President's Proclamation Declaring a National Emergency at the Southern Border

On February 15, 2019, in accordance with requirements of the NEA, 50 U.S.C. § 1601 *et seq.*, the President issued a proclamation declaring that "a national emergency exists at the southern border of the United States." *See* Proclamation. The President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* The President explained:

> The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and

> seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate.

"Because of the gravity of the current emergency situation," the President determined that "this emergency requires use of the Armed Forces" and "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.*

To achieve its purpose, the Proclamation makes 10 U.S.C. § 2808 authority available to the Acting Secretary of Defense. *See id.* The statute provides that "without regard to any other provision of law," the Secretary of Defense "may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a).

On March 15, 2019, the President vetoed a joint resolution passed by Congress that would have terminated the President's national emergency declaration.[3] *See* Veto Message for H.J. Res. 46, 2019 WL 1219481 (Mar. 15, 2019). In doing so, the President relied upon statistics published by CBP as well as recent congressional testimony by the Secretary of Homeland Security to reaffirm that a national emergency exists along the southern border. *See id.* The President highlighted (1) the recent increase in the number of apprehensions along the southern border, including 76,000 CBP apprehensions in February 2019, the largest monthly total in the last five years; (2) CBP's seizure of more than 820,000 pounds of drugs in fiscal year 2018; and (3) arrests in fiscal years 2017 and 2018 of 266,000 aliens previously charged with or convicted of crimes. *See id.* The President also emphasized that migration trends along the southern border have changed from primarily single adults

[3] Congress's efforts to override the President's veto to enact the joint resolution into law were unsuccessful. *See* Summary, H.J. Res. 46, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-joint-resolution/46.

from Mexico, who could be easily removed upon apprehension, to caravans that include record numbers of families and unaccompanied children from Central America. *See id.* The President explained that this shift requires frontline border enforcement personnel to divert resources away from border security to humanitarian efforts and medical care. *See id.* Further, the President stated that criminal organizations are taking advantage of the large flows of families and unaccompanied minors to conduct a range of illegal activity. *See id.* With new surges of migrants expected in the coming months, the President stated that border enforcement personnel and resources are strained "to the breaking point." *See id.* The President concluded that the "situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it." *See id.*

The situation at the southern border has continued to deteriorate and DHS is facing "a system-wide meltdown." *See* Nielsen Letter (Ex. 1). "DHS facilities are overflowing, agents and officers are stretched too thin, and the magnitude of arriving and detained aliens has increased the risk of life threatening incidents." *Id.* So far this fiscal year there have been a total of 593,507 individuals apprehended between ports of entry, as compared to 396,579 total apprehensions during all of fiscal year 2018. *See* DHS Sw. Border Migration Statistics FY 2019; *see also* U.S. Customs and Border Protection Announces May 2019 Migration Statistics.

VI. **The Use of Statutory Authorities for Barrier Construction**

On the same day the President issued the Proclamation, the White House publicly released a fact sheet setting forth the sources of funding that are to be used to construct additional barriers along the southern border. In addition to the $1.375 billion appropriation in the Fiscal Year 2019 Consolidated Appropriations Act for the construction of border barriers in the Rio Grande Valley sector of Texas, *see* Pub. L. No. 116-6, § 230, 133 Stat. 13 (2019), the fact sheet identifies the following additional sources of funding for potential barrier construction, which it explains will be used

sequentially and as needed: (1) About $601 million from the Treasury Forfeiture Fund, 31 U.S.C. § 9705; (2) Up to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities (10 U.S.C. § 284); (3) Up to $3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency (10 U.S.C. § 2808). *See* President Donald J. Trump's Border Security Victory (Feb. 26, 2019), (Ex. 5)

In accordance with § 284, on February 25, 2019, DHS requested DoD's assistance in blocking 11 specific drug-smuggling corridors on Federal land along certain portions of the southern border. *See* Declaration of Kenneth Rapuano ¶ 3 (April 25, 2019) (Ex. 6) ("Rapuano 4/25 Decl."). The request sought the replacement of existing vehicle barricades or dilapidated pedestrian fencing with new pedestrian fencing, the construction and improvement of existing patrol roads, and the installation of lighting. *Id.* On March 25, 2019, the Acting Secretary of Defense approved two projects in Arizona and one in Luna County and Doña Ana County, New Mexico, designed to replace existing infrastructure at the border. *Id.*

To devote additional resources to border barrier construction under its counter-drug support authority, DoD transferred $1 billion in surplus Army compensation funds to the counter-narcotics support appropriation on March 25, 2019. *See* Rapuano 4/25 Decl. at ¶¶ 5, 6. The Acting Secretary of Defense directed the transfer of funds pursuant to DoD's general transfer authority under § 8005 of the DoD Appropriations Act for Fiscal Year 2019, which authorizes the transfer of certain DoD funds between appropriations provided "[t]hat the authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Pub. L. No. 115-245, § 8005; *see also* Rapuano 4/25 Decl. ¶ 5.

STATUTORY BACKGROUND

I. The National Emergencies Act

The National Emergencies Act (NEA), Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651), was an effort by Congress to "establish procedural guidelines for the handling of future emergencies with provision for regular Congressional review." S. Rep. No. 94-922, at 1 (1976).[4] Title II of the NEA—codified at 50 U.S.C. § 1621—prescribes rules for the declaration of national emergencies by the President. Section 1621(a) authorizes the President to "declare [a] national emergency" with respect to statutes "authorizing the exercise, during the period of a national emergency, of any special or extraordinary power." 50 U.S.C. § 1621(a). Section 1621(b) states that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with [the NEA]." *Id.* § 1621(b).

Congress did not define the term "national emergency" or place any conditions on the President's ability to declare a national emergency. Instead, Congress intentionally left this determination to the President. As the co-chairmen of the Special Congressional Committee on National Emergencies that studied the issue and drafted the NEA explained, "[W]e did review this possibility of defining what national emergencies might be comprehended; and we decided you would cause more trouble by trying to define it than just saying 'national emergency' . . .". We felt it would be wrong to try to circumscribe with words with what conditions a President might be confronted."

[4] The NEA was the culmination of a multi-year effort by Congress to examine the field of emergency statutes and procedures. *See* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 3-9 (1976) (summarizing legislative history of NEA from 1972-1976, including extensive work conducted by the Senate Special Committee on National Emergencies) (hereinafter "NEA Source Book").

Nat'l Emergencies Act: Hr'gs Before the Subcomm. On Admin. Law and Governmental Relations, 94th Cong. 27 (March 6, 1975) (statement of Sen. Mathias); *see id.* at 31 ("[W]e didn't attempt to define it specifically because we were afraid we would circumscribe the President's constitutional powers."); *see id.* at 27 (statement of Sen. Church) ("[O]nce we got into that thicket [of defining a national emergency] it became evident that we would be creating more problems than we would be solving."). And during the final debate on the NEA, the House of Representatives specifically rejected an amendment that would have limited the circumstances in which the President could declare a national emergency only to times of war or attacks upon the United States only. *See* NEA Source Book at 278–80; *see id.* at 280 (statement of Rep. Moorhead) ("[T]his amendment would completely take away from the President the flexibility of acting in times of crisis or an emergency" and "it is important that we give our President some flexibility from time to time."). At the time of its passage, Congress therefore expressly recognized that the NEA "makes no attempt to define when a declaration of national emergency is proper." *Id.* at 9 (quoting S. Rep. No. 94-1168).

The NEA was "an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." *See* S. Rep. No. 94-1168, at 3 (1976). Accordingly, the NEA provides that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631. The NEA thus establishes procedural guidelines for the President to follow before he may invoke other statutory authorities.

In the more than 40 years since Congress enacted the NEA, Presidents have exercised broad discretion in determining what challenges amount to national emergencies, declaring nearly 60 national emergencies addressing a wide variety of national and international challenges. For example, prior national emergency declarations have authorized the invocation of statutory powers to restrict the

trade in uncut diamonds used to fund Sierra Leone's civil war, Exec. Order No. 13194, 66 Fed. Reg. 7389 (Jan. 18, 2001), to address the spread of swine flu in the United States, Proc. No. 8443, 74 Fed. Reg. 55439 (Oct. 23, 2009), and to promote democracy or conflict resolution in various countries around the world, *see, e.g.*, Exec. Order No. 13712, 80 Fed. Reg. 73633 (Nov. 22, 2015) (President Obama declared a national emergency to address the "violence against civilians" and "political repression" in Burundi).

The NEA also authorizes the President to renew declared emergencies annually without limitation. *See* 50 U.S.C. § 1622(d). Thirty-one national emergencies remain in effect today, with many having been renewed by multiple Presidents over several decades. For example, President Clinton declared a national emergency in 1996 after Cuban military aircraft intercepted and destroyed two unarmed U.S. registered civilian aircraft in international airspace north of Cuba. *See* Proc. No. 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996) (authorizing the Secretary of Transportation to issue rules regulating the anchorage and movement of vessels that may travel into the territorial waters of Cuba). The emergency remains in effect today, having been renewed over the course of 23 years by Presidents Bush, Obama, and Trump, even though President Obama concluded in 2016 that "the descriptions of the national emergency set forth in Proclamations 6867 and 7757 no longer reflect the international relations of the United States related to Cuba." *See* Proc. No. 9398, 81 Fed. Reg. 9737 (Feb. 24, 2016). Indeed, the first national emergency declared under the NEA—President Carter's 1979 emergency declaration stemming from the Iran hostage crisis—has been in effect for 39 years and is now being continued because "relations with Iran have not yet normalized, and the process of implementing the agreements with Iran, dated January 19, 1981, is ongoing." *See* Cont. of Nat'l Emergency With Respect to Iran, 2016 WL 6518765 (Nov. 3, 2016) (Ltr. from President Obama); *see also* 83 Fed. Reg. 56251 (Nov. 8, 2018) (renewal by President Trump).

Nothing in the NEA requires that a national emergency be a sudden or unforeseen event, as some emergencies build through an accretion of events and exist over a considerable period of time. In 1990, for example, President George H. W. Bush declared a national emergency arising from the "proliferation of chemical and biological weapons" around the world. Exec. Order No. 12735, 55 Fed. Reg. 48587 (Nov. 16, 1990). Four years later, President Clinton added nuclear weapons proliferation to that emergency declaration. Exec. Order No. 12938, 59 Fed. Reg. 58099 (Nov. 14, 1994). President Clinton also declared a national emergency arising from narcotics trafficking centered in Colombia, Exec. Order No. 12978, 60 Fed. Reg. 54579 (Oct. 21, 1995), and President Obama declared a national emergency arising from the activities of certain transnational criminal organizations, Exec. Order No. 13581, 76 Fed. Reg. 44757 (July 24, 2011). These declarations, like the President's Proclamation, addressed long-standing policy challenges confronting the United States, even though they were neither new nor unforeseen at the time they were declared to be a national emergency. Indeed, the President's Proclamation acknowledged that the situation at the southern border is a "long-standing" problem and builds on the efforts of President Obama's previous declaration of a national emergency targeting the threats posed by four transnational criminal organizations, including a Mexican cartel known as Los Zetas. *See id.*

Recognizing that, by their very nature, declarations of national emergency require the need for flexibility in policy choices that are the province of the political branches of the federal government, Congress gave itself the exclusive authority to exercise oversight of a President's national emergency declaration. As a remedy to potential overreach, Congress has authority to terminate a national emergency by enacting into law "a joint resolution." 50 U.S.C. § 1622(a)(1).[5] Emphasizing the political

[5] The original draft of the NEA would have automatically terminated a national emergency after six months. *See* NEA Source Book, at 7. Congress eliminated this provision during debate and replaced it with the requirement in the final version of the law that Congress pass a "concurrent resolution" to terminate a national emergency. *See id.*; *Beacon Prods. Corp. v. Reagan*, 814 F.2d 1, 4 (1st Cir. 1987)

judgment that Congress must make, the NEA expressly requires Congress to meet "[n]ot later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, . . . to consider a vote on a joint resolution to determine whether that emergency shall be terminated." *Id.* § 1622(b); *see also id.* § 1622(c) (establishing procedure for both Houses of Congress to vote on a joint resolution terminating a national emergency). Additionally, Congress has imposed extensive reporting requirements on the Executive Branch when the President declares a national emergency. *See id.* § 1641(a)–(b) (requiring the President and each executive agency to maintain a file and index of, and transmit to Congress, certain orders, rules, and regulations); *id.* § 1641(c) (requiring the President to periodically transmit to Congress "a report on the total expenditures incurred by the United States Government . . . which are directly attributable to the exercise of powers and authorities conferred by such declaration"). The NEA does not provide any role for the courts in reviewing a national emergency declaration, as it does not create a private right of action or contain a civil enforcement mechanism.

II. **10 U.S.C. § 284**

10 U.S.C. § 284 states that "[t]he Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government," if requested by the relevant "official who has responsibility for [such] counterdrug activities." 10 U.S.C. § 284(a), (a)(1)(A). This support includes express authority for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). This authority does not require a declaration of national emergency.

Congress first provided DoD this authority in the National Defense Authorization Act for

(Breyer, J.). In 1985, Congress amended this provision and replaced the "concurrent resolution" requirement with one that calls for termination of a national emergency by "joint resolution." Pub. L. No. 99-93, § 801, 99 Stat. 405, 448 (1985). This amendment was the result of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 959 (1983), which invalidated a similar provision as unconstitutional. *See United States v. Amirnazmi*, 645 F.3d 564, 581 n.26 (3d Cir. 2011).

Fiscal Year 1991. Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1991). As a specific fiscal year appropriation, § 1004 had to be periodically renewed to continue DoD's authority to support counter-drug activities. *See, e.g.*, Pub. L. No. 107-107, § 1004, 115 Stat. 1012 (2001). Not only did Congress regularly renew § 1004, it frequently praised DoD's involvement in building barrier fences along the southern border and allocated additional funds to DoD to encourage its support of counter-drug construction projects. For example, in 1993, Congress "commend[ed]" DoD's efforts to reinforce the border fence along a 14-mile drug smuggling corridor in the San Diego-Tijuana border area, calling the project "precisely the kind of federal-local cooperative effort the Congress had in mind in enacting section 1004." H.R. Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993). Government officials and Congress alike have noted the particular importance of DoD's involvement in southern border enhancement projects to prevent drug smuggling. *See* Hr'g Before the S. Comm. On Armed Servs. Subcomm. On Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Test. of Barry R. McCaffrey, Dir. of the Office of Nat'l Drug Control Policy) (testifying about the "vital contributions" made by DoD to construct barrier fencing along the southern border); *see, e.g.*, H.R. Rep. No. 110-652, 420 (2008) (recommending a $5 million increase to DoD's funding to continue construction of a southern border fence, which was described as an "invaluable counter-narcotics resource"); *see also* H.R. Rep. No. 109-452, 368-69 (2006) (allocating a total of $5 million of DoD funding for constructing border fencing in California, Texas, and Arizona); H.R. Rep. No. 110-146, 385-86 (2007) (recommending an $8 million increase in DoD funding to build border fencing in California and Arizona). In light of the continuing "threat posed by the production and trafficking of heroin, fentanyl (and precursor chemicals), and other illicit drugs" across our nation's borders, Congress codified § 1004 at 10 U.S.C. § 284 in December 2016, directing DoD "to ensure appropriate resources are allocated to efforts to combat this threat." H.R. Rep. No. 114-840, 1146 (2016).

III. **10 U.S.C. § 2808**

First enacted as part of the 1982 Military Construction Authorization Act, Pub. L. No. 97-99, § 903, 95 Stat. 1359 (1981), and later amended by the Military Construction Codification Act of 1982, Pub. L. No. 97-214, § 2, 96 Stat. 153 (codifying 10 U.S.C. §§ 2801–08), 10 U.S.C. § 2808(a) provides:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

Congress recognized that "it is impossible to provide in advance for all conceivable emergency situations" and wanted to fill "a gap that now exists with respect to restructuring construction priorities in the event of a declaration of war or national emergency." H.R. Rep. No. 97-4472 (1981).

The term "military construction" as used in § 2808 "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23)." 10 U.S.C. § 2801(a). Congress in turn defined the term "military installation" to mean "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4).

Presidents have invoked the military construction authority under Section 2808 on two prior occasions. First, in August 1990, President George H.W. Bush authorized the use of § 2808 in 1990 following the Government of Iraq's invasion of Kuwait. *See* Exec. Order No. 12722, 55 Fed. Reg.

31803 (Aug. 2, 1990); Exec. Order No. 12734, 55 Fed. Reg. 48099 (Nov. 14, 1990).[6] Second, President George W. Bush invoked Section 2808 in response to the terrorist attacks against the United States on September 11, 2001. *See* Proc. No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); Exec. Order No. 13235, 66 Fed. Reg. 58343 (Nov. 16, 2001). The national emergency declaration stemming from the terrorist attacks of September 11, 2001, remains in effect today, *see* 83 Fed. Reg. 46067 (Sept. 10, 2018), and DoD has used its § 2808 authority to build a wide variety of military construction projects, both domestically and abroad, over the past 17 years, *see* Cong. Research Serv., Military Construction Funding in the Event of a National Emergency at 1–3 & tbl. 1 (updated Jan. 11, 2019) (listing projects worth $1.4 billion performed domestically and abroad using § 2808 between 2001 and 2014).

IV. 31 U.S.C. § 9705

The Department of Treasury Forfeiture Fund collects proceeds from "seizures and forfeitures made pursuant to any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury or the United States Coast Guard." 31 U.S.C. § 9705(a). Congress established the fund in 1992, and the authorizing legislation sets forth the purposes for which the fund's revenue may be used. *See* S. Rep. No. 102-398 (1992). As relevant here, § 9705(g)(4)(B) states that any surplus unobligated funds (after reserving certain statutorily required amounts) "shall be available to the Secretary, without fiscal year limitation, . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization."

PLAINTIFFS' CLAIMS

Plaintiffs allege that the Proclamation violates the NEA, and, alternatively, that the NEA, "as construed by the Proclamation," runs afoul of the "nondelegation doctrine." *Id.* ¶¶ 120–33 (Counts

[6] President George W. Bush terminated this national emergency and the invocation of Section 2808 authority in 2004 following the removal of the regime of Saddam Hussein. *See* Exec. Order No. 13350, 69 Fed. Reg. 46055 (July 29, 2004).

I-II). Plaintiffs assert that the Government's use of § 2808 and § 284 violates the Appropriations Clause of the Constitution, and that the use of these authorities, as well as § 9705, also violates the APA. *Id.* ¶¶ 134–64 (Counts III-V). Plaintiffs also challenge DoD's use of its transfer authority to make additional funding available for border barrier construction under § 8005 of the 2019 DoD Appropriations Act. *Id.* ¶¶ 165–70 (Count VI). Finally, Plaintiffs assert that the President's invocation of the NEA violates the Take Care Clause of the Constitution. *Id.* ¶¶ 171–75 (Count VII).

STANDARDS OF REVIEW

I. Rule 12 Standard

A court must dismiss a case under Civil Rule 12(b)(1) for lack of subject matter jurisdiction if it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). The party asserting subject-matter jurisdiction has the burden of proving it exists by a preponderance of the evidence. *See New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008). To survive a motion to dismiss under Civil Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A complaint that "tenders naked assertions devoid of further factual enhancement" is insufficient. *Id.* (internal citation and alteration omitted).

II. Rule 56 Standard

The parties have filed cross-motions for summary judgment. Rule 56 of the Federal Rules of Civil Procedure mandates entry of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013). The Government agrees with Plaintiffs that this case presents questions of law for the Court to resolve that do not require further factual development through discovery, Pls.' Mot. for

Summ. J. or, in the Alternative, a Prelim. Inj. ("Pls.' MSJ") at 1, ECF No. 54; in these circumstances, the Court should enter either summary judgment for the Government based on the parties' moving papers, or dismiss the First Amended Complaint under Civil Rule 12.

ARGUMENT

I. Plaintiffs' Challenge to the President's Declaration of a National Emergency Should Be Dismissed (Counts I-II, VII).[7]

A. The NEA Evidences Congress's Intent to Preclude Judicial Review of National Emergency Declarations.

The Supreme Court has instructed that in determining whether a statute "precludes judicial review," a court must examine the "express language" as well as "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). That Congress intended to preclude judicial review need only be "fairly discernible." *Id.* at 350-51.

Here, Congress's intent to preclude judicial review is evidenced by the text of the NEA, which does not define the term national emergency or provide courts with any standards by which to evaluate the President's exercise of this authority. *See* 50 U.S.C. § 1621. The lack of a definition in the statute reflects Congress's intentional decision to leave to the President the determination about when and under what circumstances to declare a national emergency. The absence of any judicially enforceable remedy is further supported by the fact that the NEA establishes only procedural and reporting guidelines that the President must follow when he invokes other statutory authorities conditioned on a declaration of a national emergency declaration. *See* 50 U.S.C. §§ 1631, 1641. In the event the President declares a national emergency, he must notify Congress of the statutory authorities he intends to rely upon and provide information to Congress about how those authorities are being

[7] In a footnote, Plaintiffs raise a "Take Care Clause" claim against the President stemming from violations of the NEA. Pls.' MSJ at 26 n.10. Judgment for the Government on this count is appropriate for the same reasons Plaintiffs' direct challenge to the NEA fails.

utilized by the Executive Branch. *See* 50 U.S.C. §§ 1631, 1641. Accordingly, the NEA does not give litigants any role in the statutory process, let alone a role that Plaintiffs could enforce in court. *See Amirnazmi*, 645 F.3d at 581 (stating that the "NEA places the onus on Congress to ensure emergency situations remain anomalous and do not quietly evolve into default norms").

The lack of a judicial enforcement mechanism to challenge a national emergency declaration is reinforced by the NEA's exclusive remedial scheme for Congress to challenge through political means the President's determination that a particular national emergency exists. *See* 50 U.S.C. § 1622; *see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15, (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."). As explained above, Congress has the authority to terminate a national emergency by enacting into law "a joint resolution." 50 U.S.C. § 1622(a)(1). Further, the NEA expressly requires Congress to vote on whether to terminate the declared emergency within six months of the President's declaration and establishes expedited procedures for Congress to vote on such a measure once a termination resolution is introduced. *Id.* § 1622(b), (c). Here, majorities of both houses of Congress attempted to terminate the President's national emergency declaration by passing a joint resolution, but the President vetoed that measure, and there was insufficient support to override the President's veto to enact the joint resolution into law. *See supra* at n.3. Congress's inability to terminate the Proclamation through the NEA's statutory procedures only underscores that the Court should not step in to adjudicate this dispute. *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) ("Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain.").

Moreover, when Congress had the opportunity to change the oversight structure of the NEA in response to the Supreme Court's *Chadha* decision that declared the "legislative veto" unconstitutional, Congress notably changed the termination threshold from a "concurrent resolution,"

which does not involve Presidential approval, to a "joint resolution," which requires either Presidential approval or adequate congressional support to override a Presidential veto in order to be enacted.[8] *See supra* pp. 14–15 & n.5. Congress could have instituted a different mechanism, such as creating a judicial-enforcement regime, but did not do so. *See Beacon Prods. Corp.*, 814 F.2d at 4 (Breyer, J.) ("This legislative history makes clear that Congress intended to impose upon itself the burden of acting affirmatively to end an emergency."). Instead, Congress gave itself the power to oversee the President's use of statutory emergency authority, and there is no basis for the Court to create a new judicial remedy on top Congress' carefully-crafted framework. Where, as here, the statute expressly provides Congress with authority to terminate a national emergency, it is "an 'elemental canon' of statutory construction that . . . courts must be especially reluctant to provide additional remedies." *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533 (1989) (citations omitted).

Further, the NEA was the product of a multi-year study by Congress to address the field of national emergency authorities, and nothing in that extensive legislative history suggests that Congress intended to allow judicial challenges to the President's national emergency declarations. To the contrary, the legislative history shows that Congress, not the courts, would be the branch of government to oversee the President's use of his emergency powers. *See* NEA Source Book at 338 ("every type and class of presidentially declared emergency will be subjected to congressional control" and "the legislative branch will be in a position to assert its ultimate authority"); *see also Block*, 467 U.S. at 349 (preclusion of judicial review may be implied from "specific legislative history" alone). Moreover, given the President's "unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982), any remedial scheme where litigants could sue the President to challenge

[8] The NEA's "provision for termination by concurrent resolution is unconstitutional because, unlike a joint resolution, termination by concurrent resolution would enable Congress to take legislative action without presenting the action to the President for his signature." *Beacon Prods. Corp. v. Regan*, 633 F. Supp. 1191, 1196 (D. Mass. 1986), *aff'd,* 814 F.2d 1 (1st Cir. 1987); *see supra* note 3.

a national emergency declaration would raise separation of powers concerns and create tension with the Supreme Court's admonition that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 501 (1866). There is no indication in the legislative history that Congress gave consideration to those weighty issues or concluded that such lawsuits against the President should proceed. *See* NEA Source Book at 342 (stating that "there is [no] intent here to limit either the President's power or flexibility to declare a national emergency" and there is no intent to limit "the subject matter of the emergency or the timing of its declaration") (statements of Reps. Moorhead and Flowers). In the absence of clear direction from Congress, the Court should not imply a remedy that would conflict with longstanding separation-of-powers principles.

In light of the NEA's text, structure, and legislative history, Congress has precluded judicial review of the President's national emergency Proclamation.

B. Plaintiffs' Challenge to the President's National Emergency Declaration Presents a Nonjusticiable Political Question.

Courts that have considered the issue have uniformly concluded that a Presidential declaration of a national emergency is a nonjusticiable political question. *See Soudavar v. Bush*, 46 F. App'x 731 (5th Cir. 2002) (per curiam) (affirming district court decision dismissing a challenge to executive orders imposing national emergency sanctions on Iran as involving a "nonjusticiable political question"); *Chichakli v. Szubin*, 2007 WL 9711515, at *4 (N.D. Tex. June 4, 2007) (holding that a challenge to President Bush's declaration of a national emergency with respect to the "unstable situation" in Liberia "presents a nonjusticiable political question"), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008).[9]

[9] *See also Amirnazmi*, 645 F.3d at 581 ("federal courts have historically declined to review the essentially political questions surrounding the declaration or continuance of a national emergency")(citation omitted); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 (9th Cir. 1982) ("we will not address these essentially-political questions"); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 573 (Cust. & Pat. App. 1975) (courts will not "review the judgment of a President that a national emergency exists"); *Beacon Prods. Corp.*, 633 F. Supp. at 1194-95 (whether national emergency existed with respect

Since passage of the NEA in 1976, there have been nearly 60 national emergencies that have been declared by seven different Presidents, and even in the few instances where the declarations have been challenged, *see supra* note 10, no court has ever reviewed the merits.[10] This Court should not depart from this long line of unbroken authority.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Both the separation-of-powers doctrine and the policy of judicial self-restraint require that federal courts refrain from intrusion into areas committed by the Constitution to the Legislative and Executive Branches of the Government. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The *Baker* Court set forth the factors that a court is to consider in determining whether a particular

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to Nicaragua presents a non-justiciable political question); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 109 (2d Cir. 1966) (concluding that President Truman's national emergency declaration concerning the situation in Korea is not justiciable and "courts will not review a determination so peculiarly within the province of the chief executive"); *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, Region II*, 459 F.2d 676, 679 (3d Cir. 1972) ("a President's declaration of national emergency is unreviewable"); *Santiago v. Rumsfeld*, 2004 WL 3008724, at *3 (D. Or. Dec. 29, 2004) (holding that plaintiffs challenge to "whether the national emergency declared by the President continues to apply to Afghanistan" has "raised an essentially political issue" and "[c]ourts should refrain from ruling on such issues"), *aff'd*, 403 F.3d 702 (9th Cir. 2005) and 407 F.3d 1018 (9th Cir. 2005); *United States v. Groos*, 616 F. Supp. 2d 777, 788-89 (N.D. Ill. 2008) ("The court cannot question the President's political decision" to declare a national emergency regarding "unrestricted access of foreign parties to U.S. goods and technology"); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) ("Furthermore, to the extent that the plaintiffs' inquiry into the 'true facts' of the Libyan crisis would seek to examine the President's motives and justifications for declaring a national emergency, such an inquiry would likely present a nonjusticiable political question.").

[10] Past practice also belies Plaintiffs' suggestion that this national emergency declaration is both justiciable and invalid because the President stated that he "didn't need" to issue the declaration and "could do the wall over a longer period of time." *See* Pls.' MSJ at 6, 23. A national emergency declaration necessarily reflects an exercise of discretion, and Presidents have often chosen to declare national emergencies to address circumstances that were neither new nor unforeseen at the time the declaration issued. *See supra* Statutory Background, Pt. I. No court has ever conducted the type of judicial second guessing that Plaintiffs propose here by evaluating whether an emergency could have been addressed without relying on emergency statutory authorities.

claim raises nonjusticiable political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The existence of any one of these factors indicates the existence of a political question. *Id.* Here, Plaintiffs' assertion that the situation along the southern border does not constitute a national emergency runs afoul of most, if not all, of these factors.

First, there are no judicially manageable standards to ascertain whether or when to declare a "national emergency." As explained above, Congress intentionally chose not to define the term "national emergency" and left that determination to the President, subject only to oversight from Congress. *See supra*, Statutory Background, pt. I. The NEA sets forth no criteria from which the Court could judge the President's action or make a determination about whether a particular issue constitutes a national emergency. *See Spawr Optical Research*, 685 F.2d at 1080 ("The statute contained no standards by which to determine whether a national emergency existed or continued."). Indeed, Plaintiffs ask the Court to take the remarkable step of supplanting the President's determination with the "courts' own unmoored determination of what United States policy toward [the southern border] should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). The Court could not decide this question "without first fashioning out of whole cloth some standard for when" a national emergency "is justified." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010). To grant Plaintiffs' requested relief, the Court would have to conduct a standardless inquiry into how the current humanitarian and security crisis at the border impacts immigration policy, foreign relations, public safety, and national security. "The judiciary lacks the capacity for such a task." *Id.*

Second, any such determinations would require precisely the sort of "policy determination of a kind clearly for nonjudicial discretion" that the Supreme Court has indicated is a hallmark of a political question. *Baker*, 369 U.S. at 217. As the Supreme Court has long recognized, illegal immigration creates "significant economic and social problems" in the United States. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975); *see also Plyler v. Doe,* 457 U.S. 202, 237 (1982) (Powell, J., concurring) (recognizing illegal immigration to be "a problem of serious national proportions"). More recently, in *Arizona v. United States,* 567 U.S. 387 (2012), the Court emphasized that the problems posed by illegal immigration "must not be underestimated" and credited evidence in the record of various problems "associated with the influx of illegal migration across private land near the Mexican border," including "an epidemic of crime" and "safety risks." *Id.* at 397-98 (citation omitted).

The President has chosen to confront these and other challenges traceable to the current crisis at the border by declaring a national emergency and invoking the express powers delegated to him by Congress. *See* Proclamation. Under these circumstances, the Court cannot review the matter without second-guessing the President's policy determinations. Decisions "about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing our borders patently involve policy judgments about resource allocation and enforcement methods." *New Jersey v. United States*, 91 F.3d 463, 370 (3d Cir. 1996). These "issues fall squarely within a substantive area clearly committed by the Constitution to the political branches; they are by their nature peculiarly appropriate to resolution by the political branches of government both because there are no judicially discoverable and manageable standards for resolving them." *Id.* (citation omitted); *see Sadowski v. Bush*, 293 F. Supp. 2d 15, 19 (D.D.C. 2003) ("[D]eciding how to best enforce existing immigration laws and policies and how to keep out illegal immigrants requires making policy judgments that are suited for nonjudicial discretion and thus should not be made by the judiciary."). Accordingly, the President's Proclamation is not reviewable.

Third, the type of policy decisions that Plaintiffs ask this Court to make are entrusted to the political branches, not the courts. "[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of the government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). As the Supreme Court has explained:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Mathews v. Diaz, 426 U.S. 67, 81 (1976) (footnote omitted); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). The President's decision to declare a national emergency is a quintessential policy decision in an area reserved to the political branches involving matters of immigration, foreign relations, use of military forces, and national security. *See, e.g.*, *Hernandez v. Mesa*, 885 F.3d 811, 819 (5th Cir. 2018) (en banc) (recognizing that "border security" presents important "[n]ational-security concerns"), *petition for cert. granted,* No. 17-1678 (June 20, 2018); *Texas v. United States*, 106 F.3d 661, 664-65, 667 (5th Cir. 1997) (holding that the federal government's alleged failure to control illegal immigration is a nonjusticiable political question).[11] There is no basis for the Court to substitute its judgment for that of the President on sensitive policy issues that are nonjusticiable political questions.

[11] *See also United States v. Delgado–Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States."); *Sierra Club v. Ashcroft*, 2005 WL 8153059, at *6 (S.D. Cal. Dec. 13, 2005) (holding that the construction of border barriers "relates to matters over which the Executive Branch has independent and significant constitutional authority: immigration and border control enforcement and national security").

C. The President Should Be Dismissed as a Party to this Lawsuit Because There Is No Cause of Action Against the President and Plaintiffs Cannot Obtain Equitable Relief Against the President.

Plaintiffs' claims against the President (including the issuance of the Proclamation and their Take Care Clause claim) confront yet another obstacle: there is no cause of action against the President, and Plaintiffs may not obtain—and the Court may not order—equitable relief directly against the President for his official conduct.

Plaintiffs lack a cause of action to sue the President. The actions of the President are not reviewable under the APA, *see Dalton*, 511 U.S. at 479, and likewise there is no implied equitable cause of action to do so. Although courts of equity may in some circumstances permit suits to "enjoin unconstitutional actions by . . . federal officers," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), the availability of such relief depends on whether it "was traditionally accorded by courts of equity," *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 319 (1999). Here, there is no tradition of equitable relief against the President. To the contrary, the Supreme Court recognized over 150 years ago in *Mississippi v. Johnson* that federal courts lack jurisdiction to "enjoin the President in the performance of his official duties," 71 U.S. at 501, a principle the Court reaffirmed more recently in *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("apparently unbroken historical tradition supports the view" that courts may not order the President to "perform particular executive . . . acts").

Moreover, the Supreme Court has twice held that causes of action that are available against other government officials should not be extended to the President absent a clear statement by Congress. *See Nixon,* 475 U.S. at 748 n.27 (declining to assume that *Bivens* and other implied statutory damages "cause[s] of action run[] against the President of the United States"); *Franklin*, 505 U.S. at 801 (declining to find cause of action against the President under the APA "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Accordingly, in the

absence of an express statutory cause of action against the President or a tradition of recognizing such suits as a matter of equity, there is no basis for the Court to infer equitable relief against the President. "The reasons why courts should be hesitant to grant such relief are painfully obvious" given the President's unique constitutional role and the potential tension with the separation of powers. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Further, the Supreme Court has taken a "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 329. Any expansion of an equitable remedy against the President here would create its own set of separation-of-powers problems by usurping "the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

Lower courts have followed the logic of *Franklin* and *Massachusetts* by dismissing the President as a defendant in civil cases and declining to impose either declaratory or injunctive relief against him in his official capacity. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) ("In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself."), *vacated and remanded*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) ("the extraordinary remedy of enjoining the President is not appropriate here"), *vacated as moot*, 138 S. Ct. 377 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief . . . ."); *Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) (dismissing "the President himself as a party to this case").

These restrictions foreclose Plaintiffs' attempt to seek relief against the President in issuing the Proclamation. As regards the Government's use of § 284, § 2808, and § 9705 to facilitate border barrier construction, Plaintiffs could potentially obtain relief against the agency Defendants because

the agencies, not the President, will construct or fund border barriers pursuant to these authorities. Accordingly, in addition to the reasons explained above, the President should be dismissed in order to avoid an unnecessary separation-of-powers conflict.[12] *See Swan*, 100 F.3d at 978 ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials.").[13]

D. Plaintiffs' Nondelegation Challenge to the NEA Is Meritless (Count II).

Plaintiffs also challenge the President's declaration of a national emergency as inconsistent with the nondelegation doctrine implicit in the Constitution's conferral of the legislative power on Congress. They approach this issue in two ways. First, they argue that the NEA's definition of an "emergency" should be cabined to "unforeseen circumstances requiring immediate action," in order to avoid an interpretation of the NEA that would run afoul of the nondelegation doctrine. Pls.' MSJ at 24–26. Second, they argue that the NEA is unconstitutional because it does not provide an "intelligible principle" for channeling Executive conduct. *Id.* at 26–30. Neither argument succeeds.

Congress may delegate its law-making authority to another branch of government so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to

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[12] It is appropriate to dismiss the President even before resolving Article III standing, for two reasons. First, the Supreme Court has repeatedly described the bar against suing the President for his official duties as jurisdictional in nature. *See Franklin*, 505 U.S. at 802-03 (quoting *Mississippi*, 4 Wall at 501.). Second, even if not technically jurisdictional, it is the sort of categorical threshold defense that should be resolved prior to an exercise of jurisdiction. *Cf. Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). At a minimum, the relief against the President should be dismissed for failure to state a claim.

[13] Although district courts in some recent cases have declined to dismiss the President at the motion-to-dismiss stage on grounds that doing so would be premature in light of uncertainty about the relief that could be provided by the defendant agencies, that is not the situation here. *See Centro Presente v. DHS*, 332 F. Supp. 3d 393, 418 (D. Mass. 2018); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018); *Saget v. Trump*, 345 F. Supp. 3d 287, 297 (E.D.N.Y. 2018). Here, however, there is no question that relief against the agencies in this case would be sufficient to redress Plaintiffs' claims seeking to halt border barrier construction. *See Swan*, 100 F.3d at 978.

conform." *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 409 (1928). To provide a constitutionally permissible "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989). And Congress may delegate in even broader terms in the realm of immigration, foreign affairs, and national security. *See In re Nat'l Security Agency Telecomm. Records*, 671 F.3d 881, 897 (9th Cir. 2011) (holding that when the delegation "arises within the realm of national security . . . the intelligible principle standard need not be overly rigid"); *see also Loving v. United States*, 517 U.S. 748, 772 (1996) (finding that delegations may be broader "where the entity exercising the delegated authority itself possesses independent authority over the subject matter"); *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . [and] is inherent in the executive power to control the foreign affairs of the nation."). "The Supreme Court has only twice invalidated legislation under this doctrine, the last time being" over eighty years ago. *In re Nat'l Security Agency Telecomm. Records*, 671 F.3d at 896.

Plaintiffs first argue that the Court should adopt a narrowing construction of the term "emergency" in the NEA to avoid a potential conflict between the NEA and the nondelegation doctrine, under the theory of constitutional avoidance. This canon of constitutional avoidance can be used to resolve a statutory interpretation issue when a "section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress." *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76 (1838) (Story, J.). In *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), the principal case on which Plaintiffs rely, it was the absence "of a clear mandate in the Act" for the "extreme position" the government advocated that led the Court to adopt a narrowing construction of an agency's regulatory authority and thereby avoid declaring as unconstitutional the regulatory scheme Congress created. *Id.* at 641, 645–46.

But even if one accepts Plaintiffs' inapt characterization of the NEA as an "extreme"

delegation of authority to the President, it is quite clear that Congress intended it. Congress did not specify what would constitute a "national emergency" under the NEA and the legislative history shows that Congress deliberately chose to leave to the President the determination of what circumstances constituted an emergency, believing such determinations to be effectively unreviewable. *See generally supra*, Statutory Background, at pt. I. Past practice reveals many cases in which a national emergency did not involve unforeseen circumstances or require immediate action on the part of the federal government, as Plaintiffs insist it must. *Id.* And in those instances Congress never even convened a vote under the NEA to overturn the President's declaration. *See Beacon Prod. Corp.*, 814 F.2d at 4. Here, the Court would not be choosing one plausible reading of the statute over another in order to accept Plaintiffs' argument, as it would in a typical constitutional-avoidance case. It would instead be substantially rewriting the NEA to adopt Plaintiffs' policy view of what circumstances should constitute a "national emergency." But where (as here) there is no ambiguity, "the canon of constitutional avoidance has no role to play." *Warger v. Shauers*, 574 U.S. 40, 50 (2014).

Setting aside Plaintiffs' meritless "avoidance" theory, there is no basis for striking down the NEA on nondelegation grounds. Indeed, the Supreme Court has not struck down a federal statute on that basis since 1935, *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001), and this case does not present a viable platform for departing from that historical streak. Plaintiffs focus on Congress's choice not to limit the circumstances under which the President may declare a national emergency, but that focus is misplaced. The declaration of a national emergency does not, on its own, give the President any new powers. Rather, the NEA is a procedural statute that requires the President to "specif[y] the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631. The statute does not "enlarge or add to Executive power." *See* Report of the Committee on Government Operations: National Emergencies Act, S. Rep. No. 1168, 94th Cong., 2d Sess. 3 (1976). Instead, the NEA was "an effort by the Congress to establish clear procedures and

safeguards for the exercise by the President of emergency powers conferred upon him by *other* statutes." *See id.* (emphasis added). The only power at issue here is military construction authority under § 2808. And § 2808 plainly contains "intelligible standards" that cabin DoD's authority: construction under § 2808 must meet the definition of "military construction" set forth in § 2801 and must be "necessary to support such use of the armed forces." The congressional notification and reporting requirements of the NEA also impose meaningful constraints for nondelegation purposes, as the Fifth Circuit has recognized. *United States v. Mirza*, 454 Fed. App'x 249, 256 (5th Cir. 2011) (agreeing with three other circuits that the International Emergency Economic Powers Act, which authorizes the President to take certain actions upon a declaration of a national emergency, does not violate the nondelegation doctrine). Congress's provision of sufficient guidance to DoD in § 2808 is thus sufficient to dispose of Plaintiffs' non-delegation claim.

II. Plaintiffs Cannot Establish Article III Standing Over Any of Their Claims.

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). The standing inquiry is particularly rigorous where, as here, a court is asked to find the actions of the other branches of government unconstitutional. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

A. Plaintiffs Have No Standing to Challenge Future Border Barrier Construction Under § 2808.

Plaintiffs lack standing to challenge possible § 2808 construction because the Acting Secretary of Defense has not yet decided to undertake or to authorize any barrier construction projects under § 2808. Rapuano 4/25/19 Decl. ¶¶ 13–14; *see also* Declaration of Kenneth Rapuano ¶¶ 5–7 (May 15, 2019) ("Rapuano 5/15 Decl.") (Ex. 7) (providing latest status of § 2808 deliberations).

The President's invocation of § 2808 in the Proclamation is not itself sufficient to establish certainly impending injury where the subsequent decision to undertake or authorize barrier construction projects under § 2808 lies with the Acting Secretary of Defense. Before authorizing § 2808 construction, the Acting Secretary of Defense will determine whether a project is "necessary to support such use of the armed forces." 10 U.S.C. § 2808. That determination can be considered only within the context of the Acting Secretary of Defense authorizing specific military construction projects presented to him for approval, a process that is ongoing. *See* Rapuano 5/15/19 Decl. ¶¶ 5–7. Moreover DoD will need to defer military construction projects to which Congress has appropriated funds that have yet to be obligated in order to fund § 2808 construction. *See id.* Speculation about injuries that might result from yet-to-be-identified barrier construction projects that might be funded under § 2808 is the type of "possible future injury" that is not sufficient to establish Article III jurisdiction. *See Clapper*, 568 U.S. at 409. The Court should not rule on Plaintiffs' § 2808 claim in the abstract when these specific decisions have not been made, let alone made in a manner that would injure Plaintiffs. Given the absence of any concrete harm, Plaintiffs lack standing to pursue their § 2808 claims.

B. **Plaintiffs Have No Standing to Challenge an Alleged Violation of § 8005 of the DoD Appropriations Act.**

Plaintiffs also cannot establish standing to challenge DoD's use of § 8005 of the 2019 DoD Appropriations Act to effectuate an internal transfer of funds between DoD appropriations. They neither claim an entitlement to the money transferred, nor assert that they are the "object" of that transfer, which simply moved funds among DoD's accounts. *Lujan*, 504 U.S. at 562. Accordingly, their standing to challenge the transfer of funding from one DoD appropriation to another is no greater than that of any taxpayer to challenge any expenditure of taxpayer money from a particular budget account. As the Supreme Court has explained, "federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus" if "every federal taxpayer

could sue to challenge any Government expenditure." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007). The intervening step of invoking § 284 is necessary to connect DoD's use of § 8005 to the border barrier construction that is the source of Plaintiffs' alleged injuries, and Plaintiffs cannot invoke their alleged harm from the separate act of constructing barriers utilizing authority provided by § 284 to establish standing for a claimed violation of § 8005. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891–94 (1990) (holding that APA review is limited to review of discrete agency action and multiple actions cannot be aggregated together).

C. El Paso County Has No Standing to Challenge the Proclamation or § 284 Construction.

To date, the Government has not authorized any border barrier construction to go forward in El Paso County. Only one project—to replace existing vehicle barriers with new pedestrian fencing in Luna County, New Mexico and Doña Ana County, New Mexico—is even within close proximity. *See* Rapuano 4/25 Decl. ¶¶ 3-4, Ex. A at 8-9 (El Paso Sector Project 1). To overcome this obvious problem with its standing, the County alleges "two interconnected, concrete injuries stemming from Defendants' actions": injury to its reputation due to the Proclamation, and impact to its pecuniary interests. Pls.' MSJ at 11. Neither provides a basis for standing.

1. Reputational Harm

The County avers that the Proclamation "create[s] the negative perception" that the southern border is an area of unrest, high crime, and low quality of life. First Am. Compl. ¶¶ 104, 107, ECF No. 52. To counter this view, the County alleges its employees are "daily required to defend the County's reputation and to disabuse misconceptions that . . . are a deterrent to people visiting or investing in El Paso County." *Id.* ¶ 105, 107. In its view, the "Proclamation frustrat[es] … the County's national campaign to promote El Paso's history and culture and its ongoing efforts to attract visitors to the County who will spend money and engage in commerce." *Id.* ¶ 107.

As a threshold matter, these allegations have nothing to do with actual border-barrier

construction and thus could not provide standing to challenge construction under § 284, § 2808, or § 9705. Plaintiffs repeatedly allege that "[t]he President's Proclamation and the activity it directs by its very issuance create the negative perception the County has sought to counter." *Id.* ¶ 94; *see also id.* ¶¶ 93, 96-97. But both § 284 and § 9705 are available regardless of the Proclamation, while a decision on § 2808 projects has yet to be made. Accordingly, the County's theory goes solely to the Proclamation itself, which is unreviewable for a number of reasons entirely separate from the County's (lack of) standing. *Clapper*, 568 U.S. at 411.

But even aside from all that, the County's standing theory is not viable. "Standing is not available to just any resident of a jurisdiction to challenge a government message without a corresponding action about a particular belief." *Barber v. Bryant*, 860 F.3d 345, 355 (5th Cir. 2017) (rejecting "purported stigmatic injury"); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 284 (5th Cir. 1996) ("[N]o parent ought to be allowed to sue over a school policy with which he disagrees unless the policy has demonstrably injured him or his child."); *Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 764-65 (D.C. Cir. 2008) (Kavanaugh, J.) (allowing standing based on offense to a government message would "eviscerate well-settled standing limitations"). So too here, while the Proclamation authorizes actions under other statutes that may later give rise to an injury-in-fact, it is not self-effectuating. That distinguishes this case from all those cited by the County in their brief, which rely on a statute authorizing sports gambling in contravention of federal law, a statute requiring the plaintiff to label himself a distributor of "foreign propaganda," an order of judicial sanctions against an individual attorney, and a congressional bill of attainder against an individual citizen.[14] None of these are remotely similar to the Proclamation.

[14] *Meese v. Keene*, 481 U.S. 465, 472–77 (1987) (politician's likely injury to his reputation as a result of complying with statutory disclosure requirements for distribution of "propaganda" grounded standing because "the Department of Justice has placed the legitimate force of its criminal enforcement powers behind the label"); *NCAA v. New Jersey*, 730 F.3d 208, 220–24 (3d Cir. 2013) (plaintiff sports leagues

Plaintiffs' theory also fails because, unlike the very specific targets of the government actions at issue in the cases it cites, the Proclamation does not specifically disparage the reputation of the County. The Proclamation does not refer to the County, and it does not follow from the Proclamation that the County necessarily has "crisis levels of crime and low quality of life." First Am. Compl. ¶ 104. Indeed, the First Amended Complaint admits the President called the city of El Paso "one of America's safest cities" in his State of the Union address just weeks before issuing the Proclamation. *Id.* at ¶ 102. El Paso is frequently invoked in debates over funding for construction along the southern border *precisely because* it "has been recognized as one of the top 10 safest cities in the country for two consecutive years." *Id.* ¶ 100; *see also id.* ¶ 100 n.19, ¶ 102 n.26 (articles about the debate over the role past barrier construction played in El Paso's low crime rate). And far from treating all parts of the southern border as equally dangerous, the Government has used its construction authority in a focused manner, and provided justifications as to why projects are needed in discrete areas of the southern border. *See* Rapuano 4/25 Decl., Ex. A (Request for Assistance from DHS to DoD, Feb. 25, 2019).

Ignoring the contradictions in its interpretation of the Proclamation, the County indulges in "speculation about 'the unfettered choices made by independent actors not before the court'" that cannot support standing. *Clapper*, 568 U.S. at 410, 414 n.5 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Ms. Keller, the Chief Administrator of the County, explains that she devotes time to "plan[ning] for counteracting the emergency declaration," including "planning for conversations in which I will have to debunk myths about El Paso," as well as time "strategizing how to combat a falsely negative image" and adjusting to "the expectation that I will not get as many applicants as I

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had standing to enforce a statutory prohibition on sports gambling both because the leagues were the effective object of efforts to legalize gambling and "the proven stigmatizing effect of having sporting contests associated with gambling"), *overruled on other grounds*, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) (plaintiff had standing to present bill of attainder claim after Congress enacted a statute targeted at a single individual, leading to "harassment by the media, estrangement from his neighbors, and loss of business and professional opportunities").

have gotten in the past" for certain jobs. Decl. of Betsy Keller ("Keller Decl.") ¶¶ 9–11, ECF No. 55-25. Likewise, Judge Samaniego explains that the Proclamation is a "serious threat to both tourism and economic development" and that it is "harming our economic development efforts . . . by generating fears of potential investors that the community will be mired in a long-term state of chaos." Decl. of Richard Samaniego ("Samaniego Decl.") ¶¶ 6, 11, ECF No. 55-26. But fears that unknown third parties will, in response to the Proclamation's general statements about the situation on the southern border, make their own independent judgments about whether or not to visit or spend money in El Paso County are precisely the sort of speculative harms the Supreme Court found insufficient for standing in *Clapper*.[15]

These allegations are not improved by the declarants' statements about their alleged investment of time and resources to combat the Proclamation. *See, e.g.*, Keller Decl. ¶¶ 9–11; Samaniego Decl. ¶¶ 11–12. "[A]sserti[ons] that [the County] suffer[s] present costs and burdens that are based on a fear of" negative economic impact cannot ground standing, even if reasonable. *Clapper*, 568 U.S. at 416. Such harm is traceable not to the actions the government has taken. *See id.* at 418; *see also Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018) ("standing cannot be conferred by a self-inflicted injury"); *Assoc. for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (rejecting theory that "any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another").

The County's "reputational injury" argument also founders even if one were to assume an

[15] Judge Samaniego also declared that, "In my capacity as County Judge, I have already heard personally from people who have a false impression that El Paso County is a dangerous place and who do not want to come here." Samaniego Decl. ¶ 10. But he does not claim that the "people" he "heard" from got the "false impression" that "El Paso County is a dangerous place" *from the Proclamation*. Plaintiffs' brief inserts the phrase "because of the President's Proclamation" at the end of this statement, Pls.' MSJ at 12, but the relevant paragraph from Judge Samaniego's declaration, quoted in full here, does not contain, or suggest, such a qualifier.

"injury-in-fact" has been established, for two reasons. First, the County has not shown the Proclamation *itself* caused the reputational injury it complains about. Public debate on the southern border has been ongoing for decades, and the County's declarants provide little more than conclusory statements linking the Proclamation to whatever reputational harm has resulted from that debate. Negative impressions of the southern border or the County may be "associated with" the Proclamation, Keller Decl. ¶¶ 6, 8, but unless the County demonstrates causation, there is no standing.

Second, the County has failed to show how a favorable decision will redress its injury. The County asks the Court to "[d]eclare that the President's Proclamation . . . is unauthorized by, and contrary to, the Constitution and laws of the United States," and to enjoin the Government from "taking any actions pursuant" to it. First Am. Compl. at 47 (prayer for relief). But it is entirely speculative to suggest a judicial finding that the Proclamation does not satisfy the NEA would bring additional business and tourists to the County or would remedy the "false and negative impression of El Paso" that the Proclamation's description of the southern border creates. Samaniego Decl. ¶ 6. Because the proposed remedy does nothing to redress the County's asserted injuries, there is no standing for the County's claims.

2. Pecuniary Injuries

The County also argues that its "pecuniary injuries" suffice to establish standing. But neither Ms. Keller nor Judge Samaniego present evidence of concrete, imminent injury to such interests as a result of an alleged downturn in El Paso's reputation caused by the Proclamation. Rather, their declarations speak of the Proclamation as "threat to both tourism and economic development," Samaniego Decl. ¶ 6, and the "fears of potential investors," *id.* ¶ 11. But threats and fears about the actions of third parties are not forms of "certainly impending" injury, and the County has failed to point to even a single example of actual or threatened loss of tourism dollars or business investment as a result of the Proclamation. Even if the County could eventually show, for example, that its tax

revenues from tourism diminished since the Proclamation, Pls.' MSJ at 14, it would also have to establish the diminution in revenue was the result of the Proclamation, not other factors, and that a declaratory judgment would undo the alleged harm caused by the statements in the Proclamation. The County has not come close to making that showing.

The remaining pecuniary injuries advanced by the County fare no better. The County argues that construction taking place across state lines "will surely disrupt the County's 'regional economy,'" Pls.' MSJ at 14 (quoting Keller Decl. ¶ 13), but Ms. Keller and Judge Samaniego offer no evidence, beyond conclusory statements and speculation, that there will in fact be serious disruption to the County's interests due to the replacement of vehicle barriers with pedestrian fencing outside of recognized ports of entry on federal land entirely outside of the County. The County also asserts that funding designated for Fort Bliss may be diverted to use under § 2808, but even assuming that is a cognizable harm, a decision has yet to be made by the Assistant Secretary of Defense regarding § 2808. Accordingly, the County's claims should be dismissed in full for lack of Article III standing.

D. **BNHR Lacks Standing to Challenge the Proclamation or § 284 Construction.**

BNHR asserts organizational standing to challenge the Proclamation and border barrier construction. First Am. Compl. ¶¶ 113–19; Pls.' MSJ at 16–19. But the four types of organization harm it alleges are not sufficient for standing purposes, either.

First, BNHR claims it has had to "divert organizational resources from its normal programming to respond to the President's Proclamation," including "counseling" and "recruit[ing] and train[ing] attorneys to handle the increase in incoming complaints," hiring a policy consultant, sending a lobbying delegation to Washington D.C., and working longer hours First Am. Compl. ¶¶ 113–15; Decl. of Fernando Garcia ("Garcia Decl.") ¶¶ 13–31, ECF No. 55-27. BNHR contends these injuries establish standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and cases applying it. But *Havens Realty* is a narrow decision that does not sanction standing on these facts.

The plaintiff organization in *Havens Realty* was a "housing counseling service" whose organizational mission included "the investigation and referral of complaints concerning housing discrimination." 455 U.S. at 363. It sent testers to an apartment complex in order to determine whether it practiced unlawful "racial steering," and subsequently brought suit to challenge the practice it discovered. In rejecting a challenge to its standing, the Supreme Court agreed that the defendant's "racial steering" had "impaired [plaintiff's] ability to provide counseling and referral services for low- and moderate-income homeseekers," establishing injury-in-fact. *Id.* at 379. Absent such a direct impairment on its mission caused by the challenged action, standing does not exist whenever a public interest organization decides to spend money opposing a governmental policy of concern or the organization suffered a "setback to [its] abstract social interests," *id.* (citing *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972)). The Fifth Circuit case law Plaintiff relies upon upholds this principle by recognizing standing only when a defendant actually inhibits a plaintiff from carrying out its organizational mission, either by imposing barriers or by neglecting a legal duty.[16]

This case lacks the nexus between organizational activities and defendant conduct present in *Havens Realty*. BNHR's mission is community organizing, education, and advocacy. Garcia Decl. ¶ 3. But the Proclamation imposes no obstacles or constraints on BNHR's ability to engage in these activities. BNHR cannot identify any legal or factual way in which the message of the Proclamation imposes new constraints on its members or the public, or identify a legal duty the Government is no

[16] *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610–12 (5th Cir. 2017) (finding plaintiff, an organization that encourages civic participation, had standing to challenge state law restricting interpreter assistance for voters because it expended resources to educate members about the restrictions so they could rely on the interpreter of their choice at the polls); *Scott v. Schedler*, 771 F.3d 831, 837–38 (5th Cir. 2014) (finding injury-in-fact and causation over a National Voter Registration Act (NVRA) claim after applying *Fowler*); *Assoc. of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 362 (5th Cir. 1999) (recognizing potential standing of political advocacy group to challenge states' implementation of the NVRA because "it has expended resources registering voters in low registration areas who would have been registered if the appellees had complied with" the statute).

longer fulfilling in reliance on the Proclamation. Rather, BNHR's efforts are explicitly intended to vindicate its "abstract social interest" in opposing the Government's policies. *See, e.g.*, Garcia Decl. ¶¶ 13–14 (explaining shift in resources to "combat the false negative message fostered by the Proclamation" and that purpose of events put on by BNHR is the "constant need to respond to immediate developments at the border and to denounce the administration's false rhetoric.").

The Fifth Circuit rejected a very similar claim of organizational standing to the one BNHR makes here in *NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010). There, the plaintiff tried to ground standing to challenge revised housing ordinances on a study it had commissioned regarding the impact of the revisions, as well as lobbying efforts designed to persuade the defendant municipality not to implement the revised ordinances, but did not explain how those efforts "differ from the HBA's routine lobbying activities," or "identif[y] any specific projects that the HBA had to put on hold or otherwise curtail in order to respond to the revised ordinances." *Id.* at 238. The *Kyle* court also reaffirmed that "redirect[ing] . . . resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Id.* (quoting *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000). BNHR's post-Proclamation activities are not different, in kind, from its pre-Proclamation mission of education, advocacy, and organizing around its views about the southern border. Moreover, BNHR does not identify any specific project it has been required to put on hold because of the Proclamation. It notes one event, "Hugs Not Walls," that was "effectively ended" by the Proclamation, but that outcome was a choice by BNHR. Mr. Garcia's declaration explains that the campaign could not continue because "law enforcement is no longer supportive" of reunifying families near the border. Garcia Decl. ¶ 32. That choice has nothing to do with a diversion of resources attributable to the Proclamation. Because its alleged harm is purely incidental to the "abstract social interest" for which it advocates, BNHR cannot avail itself of standing under *Havens Realty*.

Second, BNHR avers that the Proclamation "injures BNHR's organizational mission," not only because it diverts resources, but because it "stigmatize[s] BNHR's community members" and disrupted their "ongoing campaign to build and maintain trust between community members and law enforcement." First Am. Compl. ¶ 116; *see also* Garcia Decl. ¶ 31. This is an axiomatic "abstract social interest" as described in *Havens Realty*. Even so, the reasons Mr. Garcia gives for this deterioration ("our members' fears and the shift in attitude by the Border Patrol brought on by the rhetoric that underpins the Proclamation") are both speculative and in any event not remotely attributable to the Proclamation. Garcia Decl. ¶ 31. Moreover, "stigmatization" is not a cognizable Article III injury, as those who "are not themselves affected by a government action except through their abstract offense at the message allegedly conveyed by that action" only have standing to bring certain First Amendment claims. *Barber*, 860 F.3d at 353 n.4 (quoting *In re Navy Chaplaincy*, 534 F.3d at 764-65).

Third, the First Amended Complaint (but not the motion for summary judgment) alleges that current and future border wall construction will harm the quality of life of its members by delaying border crossings and creating unwanted pollution and noise. First Am. Compl. ¶ 117; Garcia Decl. ¶¶ 33–37. Such allegations would only permit standing to challenge the § 284 project moving forward in New Mexico. But as was true of the County's allegations of pecuniary harm, these asserted threats lack the necessary imminence and concreteness for Article III standing. Current slowdowns at border crossings cannot be the result of "recently announced" construction on federal land outside established ports of entry, and indeed, all Mr. Garcia claims is that the construction "threatens to make this problem worse" without explaining how the project will "congest[] all of the nearby ports and access roads." Garcia Decl. ¶ 34. Past negative experience with construction does not make future harm imminent, *id.* ¶ 36, and BNHR does not even allege that they have members who live in sufficient proximity to the federal land near the border such that construction would disturb them.

Finally, BNHR alleges that "the Proclamation and accompanying White House Statement in

intent and effect have stigmatized immigrant communities," causing their member families to "reasonably fear race-based violence," "fear an influx of law enforcement," and "fear increased public safety risks for children and for the community, which they must take[] steps now to mitigate." First Am. Compl. ¶ 118. But even if BNHR reasonably and sincerely believes that it must take present action in order to mitigate risks arising from fear of future events, *Clapper* squarely holds that such fears do not suffice for purposes of Article III standing. *Clapper*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

BNHR also faces similar causation and redressability problems similar to those faced by the County, insofar as their challenge focuses on the Proclamation. It provides no explanation as to how the general statements about the southern border in the Proclamation, separate from decades of intense debate about the state of the southern border generally, led to their alleged harm. And it provides no answer as to why a declaratory judgment that the Proclamation does not meet the legal requirements of the NEA cures BNHR's concerns about "false rhetoric" at the border, since a positive litigation outcome for BNHR would not disprove the factual accuracy of the statements in the Proclamation. Accordingly, BNHR also lacks standing.

III. Plaintiffs Have Not Satisfied the APA's Requirements for Review of Agency Action.

A. There Is No "Final Agency Action" Respecting § 2808 Because the Acting Secretary Has Not Yet Decided to Undertake or Authorize Any Barrier Construction Projects Under That Authority.

Because § 2808 does not provide for judicial review, APA review, if available at all, is only permitted if there has been "final agency action." *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999). Final agency action is marked by two characteristics. First, final agency action "mark[s] the consummation of the agency's decisionmaking process"; it is not "tentative" or "interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citation omitted). Second, the action "must be

one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal citation omitted). Thus, even when agency action affects the public, it cannot be challenged in court if it is interlocutory, or if it does not fix any legal rights. *See, e.g.*, *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Urban Hous. & Dev.*, 980 F.2d 1043, 1056 (5th Cir. 1993).

As discussed earlier, *see supra* at Argument, pt. II.A, the Acting Secretary of Defense has not yet decided to authorize any projects under § 2808. Rapuano 5/15/19 Decl. ¶ 13. The Proclamation does not mandate that DoD undertake any specific construction projects, much less projects impacting Plaintiffs. The Proclamation makes available to the Acting Secretary of Defense construction authority available under § 2808 to use at his discretion. The APA does not entitle Plaintiffs to challenge the Acting Secretary of Defense's decision until it is final.

B. The Use of § 2808 Construction Authority Is Committed to Agency Discretion by Law and Is Unreviewable Under the APA.

Even if there were final agency action, any decision by the Acting Secretary of Defense to undertake military construction under § 2808 is not subject to judicial review because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Courts may not review final agency action "if the statute is drawn so that court would have no meaningful standard against which to judge the agency's discretion." *Ellison v. Conner*, 153 F.3d 247, 251 (5th Cir. 1998) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830. Courts in this circuit "look first to the statutory text, paying particular attention to the words Congress has chosen," as well as "the structure and purpose of the statute" to determine whether Congress intended to place a particular set of agency decisions beyond APA review. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 233 (5th Cir. 2015).

Here, there is no meaningful standard by which the Court could review any ultimate decision by the Acting Secretary of Defense to exercise his authority under § 2808. The statute gives significant

discretion to the Acting Secretary, providing only that, in the event of a declaration of national emergency, the Secretary "may" authorize military construction projects "that are necessary to support such use of the armed forces." 10 U.S.C. § 2808. That is a quintessential military judgment, and the statute does not specify any criteria that the Secretary must consider in making his determination. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ."); *Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (finding agency action committed to discretion by law when there were "no statutory standards for the court to apply"). Nor does it include any specific prohibitions limiting the Secretary's determination of what would constitute a project "necessary" to support the use of the armed forces. *See Ellison*, 153 F.3d at 253 (determining that agency action was committed to agency discretion by law when there were no "procedural or substantive requirements" imposed on the decision maker).

Even if § 2808 contained "standards to apply," such standards would not be "judicially manageable" because the determination regarding what is "necessary to support such use of the armed forces" is an inherent military judgment to which courts have routinely deferred. *See North Dakota v. United States*, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the Army"). Any judicial review of the Acting Secretary of Defense's decision to authorize border barrier construction under § 2808 as necessary to support the use of the armed forces would necessarily require this Court to second-guess the Secretary's considered judgment on core military matters such as allocation of military resources, readiness, and the relative value of various military construction projects within the military's global national security strategy. There are no judicially manageable standards for conducting that type of review. *See NFFE v. United States*, 905

F.2d 400, 405–06 (D.C. Cir. 1990) (concluding that decisions about which military bases to close were committed to agency discretion by law because "the federal judiciary is ill-equipped to conduct reviews of the nation's military policy"). Such judgment is "better left to those more expert in issues of defense," *id.* at 406, and inherently requires a determination of the "military value" of the proposed construction projects. *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 41–42 (D.C. Cir. 2000). Indeed, "[t]his court has consistently followed the command that matters implicating . . . military affairs are generally beyond the authority or competency of a court's adjudicative powers." *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 950 (5th Cir. 2011) (internal citation omitted). For these reasons, there are no judicially manageable standards to apply, and the Secretary's determination is committed to agency discretion by law under the APA.

C. **Plaintiffs' Claims Do Not Fall Within the Zone of Interest of § 8005, § 284, or § 2808.**

The APA's "zone of interests" test forecloses suit "when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quotation omitted). The plaintiff bears the burden of establishing that the injury he complains of "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Nat'l Wildlife Fed'n*, 497 U.S. at 883. Here, Plaintiffs seek to vindicate reputational and pecuniary interests that have absolutely no connection to the interests protected by § 8005, § 284, and § 2808. Accordingly, Plaintiffs have no APA claim for violations of these statutes.

DoD's transfer authority for appropriated funds under § 8005 comes with certain limitations that Plaintiffs now seek to have judicially enforced. But Congress never contemplated third parties inserting themselves into the DoD funding process through litigation. The Constitution puts Congress and the Executive at the center of military policy, including the military budget. *See* U.S.

Const., art. I, § 8, cl. 12. "The ultimate responsibility for these decisions" about the allocation of limited resources appropriated to DoD "is appropriately vested in branches of the government which are periodically subject to electoral accountability," not the courts. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Section 8005 was designed to "tighten congressional control of the re-programming process," H. Rep. 93-662 at 16-17 (9174), but it was "phrased as a directive to" DoD, "not as a conferral of the right to sue upon" those who disagree with DoD's decision to reprogram funds. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).[17] The notice provisions of § 8005 allow DoD and Congress to resolve reprogramming disagreements as a matter of comity, or via legislation and oversight. Plaintiffs' interest in the reprogramming process is "'so marginally related to … the purposes implicit in'" § 8005 "that it cannot reasonably be assumed that Congress authorized" suit under the statute. *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 527 U.S. 118, 130 (2014) (quoting *Patchak*, 567 U.S. at 225).

Much the same reasoning applies to Plaintiffs' challenges of § 284 and § 2808. Section 284's limitations on when DoD can provide counter-drug support are designed to regulate the relationship between Congress, DoD, and state or federal agencies seeking assistance with drug trafficking, based on budgetary control and agency focus. Likewise, § 2808 exists to regulate the relationship between Congress and the Executive Branch regarding the diversion of unobligated military construction funds for other purposes during a national emergency. The "interests protected by the" statutes are completely unrelated to the interests Plaintiffs seek to vindicate in this case. *See Lexmark*, 527 U.S. at

[17] This problem cannot be avoided by reframing Plaintiffs' claims as implied equitable actions under the Appropriations Clause. *See Sierra Club v. Trump*, --- F. Supp. 3d ----, 2019 WL 2247689, at *17. On the contrary, a *stricter* test applies, because "what comes within the zone of interests of a statute for purposes of obtaining judicial review . . . under the APA may not do so for other purposes." *Lexmark*, 527 U.S. at 130. The Supreme Court has suggested that, where a plaintiff seeks to bring an implied cause of action in equity to enforce a statutory or constitutional provision, the zone-of-interests test requires that the provision be intended for the "*especial* benefit" of protecting the plaintiff at issue. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 400 & n. 16 (1987).

131. Neither statute is intended to give private parties a remedy for protecting themselves from negative externalities of construction. As such, the APA does not provide a remedy for alleged violations of these statutes.

IV. Plaintiffs' APA Claims Related to the Funding of the Border Wall (Counts V–VI) Fail On the Merits.

Plaintiffs challenge the legality of the Government's use of § 9705, § 284, and § 2808 to engage in construction along the southern border, as well as the legality of funding transfers to support § 284 construction under § 8005. None of them succeed. Accordingly, summary judgment in favor of Defendants on these counts is proper.

A. Section 9705

Although raised in their complaint, Plaintiffs' motion for summary judgment does not challenge Treasury's use of the Treasury Forfeiture Fund (TFF) to fund border barrier construction by DHS under 31 U.S.C. § 9705(g)(4)(B). The Government is entitled to summary judgment on these claims for at least three reasons. First, Plaintiffs have no standing to bring a § 9705 claim, as § 9705 funds are not being used for construction in the El Paso area, and Plaintiffs do not assert they are eligible to receive funding from the TFF that will otherwise be diverted to DHS. *See* Decl. of Loren Flossman ¶¶ 9–12 (April 1, 2019) (Ex. 8) (CBP will use TFF money for construction in the Rio Grande Valley Sector). Second, the allocation of TFF funds is committed to agency discretion by law and is thus unreviewable under the APA. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (allocation of lump sum appropriation not reviewable). Third, the use of the TFF to fund border barrier construction satisfies the minimal requirements of § 9705(g)(4)(B), which authorizes Treasury to use surplus funds to support "the law enforcement activities of any Federal agency." CBP was established to "ensure the interdiction of persons and goods illegally entering or exiting the United States," "interdict . . . persons who may undermine the security of the United States," and "safeguard the borders of the United States," among other duties. 6 U.S.C. § 211(c)(2), (5), (6); *see Arizona*, 567 U.S. at 397

(describing the role that DHS and CBP play in enforcing the country's immigration laws and "securing the country's borders"). And Congress has recognized that barriers prevent unlawful entries by aliens and smuggling of contraband across the border, *see* Secure Fence Act of 2006, Pub. L. No. 109-367, §§ 2–3, 120 Stat. at 2638–39, and thus help enforce the laws that prohibit such activities, *e.g.*, 8 U.S.C. § 1325 (improper entry by an alien); 18 U.S.C. § 545 (smuggling goods into the United States); 21 U.S.C. § 865 (smuggling methamphetamine into the United States). As such, Treasury's § 9705(g)(4)(B) transfer is lawful and judgment on Plaintiffs' claims should be entered in the Government's favor.

B. Section 2808

Plaintiffs argue that the Government cannot use § 2808 for border barrier construction because (1) the Proclamation does not establish a "national emergency" that "requires use of the armed forces"; (2) border barriers are not a "military construction project"; and (3) such projects will not be "necessary to support such use of the armed forces." Pls.' MSJ at 36–40. But Plaintiffs cannot show at this stage that the Government has failed to meet any of these requirements.

The use of § 2808 is predicated on a Presidential declaration of a national emergency "that requires the use of the armed forces," and provides the Secretary of Defense with authority to "undertake military construction projects" that are "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The statutory scheme leaves to the President the determination of whether a national emergency "requires the use of the armed forces," and courts have uniformly concluded that a Presidential declaration of a national emergency is a nonjusticiable political question. *See supra* at Discussion, pt. I.B. Similarly, determinations about whether specific construction projects would be "necessary to support such use of the armed forces" are vested in the expertise of the Secretary of Defense, and courts are not free to "second-guess military judgments." *Bynum v. FMC Corp.*, 770 F.2d 556, 563 (5th Cir. 1985); *see North Dakota*, 495 U.S. at 443 (1990) ("we properly defer

to the judgment of those who must lead our Armed Forces in battle.").

Further, although "military construction project" is a statutorily defined term, its definition is broad and illustrative, not specific or exclusive. *See* 10 U.S.C. § 2801(b). The term "military construction" is broadly defined to "*include*[] any construction . . . of any kind carried out with respect to a military installation." *Id.* § 2801(a) (emphasis added). A "military installation," in turn, "means a base, camp, post, station, yard, center, *or other activity* under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4) (emphasis added). Broad terms defining military construction as "includ[ing]" (but not limited to, *see* 10 U.S.C. § 101(f)(4)) construction with respect to a military installation. The Court has no concrete record upon which to assess whether these statutory requirements have been satisfied with respect to particular construction projects. Accordingly, Plaintiffs have not made out an APA violation with respect to § 2808.

C. **Section 284**

Plaintiffs' challenges to § 284 also miss the mark. They argue (1) that the $ 2.5 billion DoD has redirected toward border barrier construction does not qualify as "support," and (2) that the entire southern border would have to qualify as a "drug smuggling corridor[]" in order for the authority to apply. Pls.' MSJ at 40–44. Both arguments lack merit.

The text and history of § 284 contradict Plaintiffs' claim that the construction allowed under the statute to support counterdrug activities of other agencies is limited only to "small scale construction projects" under $750,000. Pls.' MSJ at 42. No such monetary restriction appears in the types of support permitted under § 284. *See* 10 U.S.C. § 284(b)-(c). To the contrary, the statute broadly approves "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" without regard to the size, scale, or budget of the project. *Id.* § 284(b)(7). And since Congress first provided this authority in 1990, DoD has repeatedly used it, with Congress's explicit approval, to complete large-scale fencing projects along

the southern border in support of DHS's counterdrug activities. For example, under authority of the first counterdrug activities support appropriation, DoD built a 14-mile fence in a drug smuggling corridor along the San Diego-Tijuana border—a project Congress described as "precisely the kind of federal-local cooperative effort the Congress had in mind" in enacting such authority. H.R. Rep. No. 103-200, at 330-31 (1993). As of 2006, Congress reported with approval that, since 1990, DoD's use of its authority to support counterdrug activities through "construction and rehabilitation" along the southern border "resulted in 7.6 miles of double-layer fencing, 59 miles of single fencing, and 169.5 miles of road." H.R. Rep. No. 109-452, at 368. And in determining appropriations for these construction activities, Congress recommended that DoD spend millions of dollars on specific border projects. *See, e.g.*, *id.* at 369 (recommending a $10 million increase in DoD's budget for fence and road-building activity on the southern border with instructions that "not less than $3.0 million" and "not less than $2.0 million" be used for fence construction projects in Texas and Arizona, respectively).

Section 284 requires the Acting Secretary of Defense to provide "a description of any small scale construction project"—which it defines as "construction at a cost not to exceed $750,000 for any project"—"for which support is provided" under § 284(b) or (c) at least 15 days in advance of providing such support. 10 U.S.C. § 284(h)(1)(B), (i)(3). Contrary to Plaintiffs' suggestion, there is nothing inherently implausible about Congress choosing to require notice for some, but not all, projects that DoD could construct under § 284. *See* Pls.' MSJ at 42. Certain types of support authorized under § 284 explicitly refer—*but are not limited*—to "small scale" or "minor" construction. *See* 10 U.S.C. § 284(b)(4) (authorizing "[t]he establishment (*including an unspecified minor military construction project*) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities . . . within or outside the United States" (emphasis added)); *id.* § 284(c)(1)(B) (authorizing "[t]he establishment (*including small scale construction*) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities . . . outside the

United States" (emphasis added)). Accordingly, if Congress wanted to limit all § 284 construction to "small scale construction," it could have and "presumably would have done so expressly." *Russello v. United States*, 464 U.S. 16, 23 (1983). Regardless of whether Plaintiffs think the scope of permissible construction activities under § 284 should be coextensive with the scope of the congressional notification requirement, "[t]he short answer is that Congress did not write the statute that way." *Id.*

Plaintiffs likewise fail to show that Defendants have violated § 284 by constructing border barriers outside of "drug smuggling corridors" permitted by the statute. Plaintiffs allege that § 284 differentiates between an "international boundary" and a "corridor" within that boundary, such that the entire southern border cannot qualify as a "drug smuggling corridor." Pls.' MSJ at 43–44. But there is no need for the Court to address the status of the entire southern border because the only § 284 project at issue in this case for which Plaintiffs would arguably have standing is El Paso Sector Project 1. With respect to that project, the record sets forth extensive evidence to support recent drug smuggling activities in that area. *See* Rapuano Decl. ¶ 3, Ex. A at 8 (thousands of pounds of illegal drugs seized between ports of entry in the El Paso Sector in fiscal year 2018). Accordingly, the Government's use of § 284 is appropriate and does not give rise to an APA violation. [18]

D. **The Consolidated Appropriations Act**

Plaintiffs have also failed to show a violation of the Consolidated Appropriations Act, 2019 (CAA). Pls.' MSJ at 33–36. Although one component of the CAA—the Department of Homeland Security Appropriations Act, 2019—places restrictions on border-barrier construction funded with DHS appropriations, the CAA does not expressly or implicitly limits the ability of the Government to

[18] Additionally, there is no merit to Plaintiffs' claim that Defendants have violation § 8045 of the DoD Appropriations Act, which prohibits the transfer of DoD counter-drug funds to another agency. *See* Pls.' MSJ at 46. DoD is not transferring its counter-drug funds to DHS. Instead, DoD is constructing the border barriers using its own funds in support of DHS pursuant to § 284.

rely upon other statutory authorities to fund the additional border-barrier construction at issue here. And the use of such statutory authorities does not violate any other provision of the CAA.

Contrary to Plaintiffs' contentions, Congress's decision not to appropriate to DHS the full amount of funds requested by the President for fiscal year 2019 border-barrier construction does not limit the Acting Secretary of Defense's ability to utilize other available statutory authorities for such construction. Plaintiffs posit that Congress's specific appropriation to DHS to fund, with restrictions, certain border-barrier construction is tantamount to a prohibition of expenditures on any other statutorily authorized border-barrier construction.[19] *See* Pls.' MSJ at 33–34. Not so. "An agency's discretion to spend appropriated funds is cabined only by the text of the appropriation." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (quotation omitted). Plaintiffs have identified no restriction in the CAA on the funding of border-barrier construction pursuant to other statutory authorities, nor does its plain text include one. *See* Pls.' MSJ at 6–7; *see generally* Pub. L. No. 116-6 (2019). Congress did not modify any of the statutes at issue here in the CAA. *See id.* And the CAA's funding provisions do not otherwise alter the meaning or availability of permanent statutes already in effect. The absence of such provisions precludes any inference that Congress intended to, or actually did, disable the use of other available authorities. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure"); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) ("[W]hen appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly."). In the absence of contrary language, the grant

[19] The DHS Appropriations Act restricts the location and manner of border-barrier construction funded by Congress's 2019 $1.375 billion appropriation to DHS for the purpose of such construction. See Pub. L. No. 116-6, div. A, §§ 230–32. Most of these restrictions expressly apply to the use of those funds only. *See id.* Plaintiffs do not allege that Defendants have violated the few restrictions that apply more generally.

of a specific appropriation cannot be read to restrict the use of other appropriated funds for similar purposes pursuant to other statutory authority. Had Congress wished to restrict all other border-barrier construction—including construction authorized funded under other statutory authorities—it could have plainly so stated. Because the CAA's text includes no such restrictions, neither its limits on border-barrier construction funded by specific DHS appropriations, nor the history of negotiations regarding border barrier construction funding constrains the Acting Secretary of Defense's ability to expend funds pursuant to other statutory authorities. *See Salazar*, 567 U.S. at 200.

In the absence of language specifically restricting the Acting Secretary of Defense's actions, Plaintiffs claim that those actions are nonetheless prohibited by § 739 of the Financial Services and General Government Appropriations Act, 2019 (a component of the CAA). That provision states:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

Pub. L. No. 116-6, div. D, § 739 (emphasis added). Plaintiffs' allegations rest upon a faulty premise: that any funds used for barrier construction are necessarily adding to a CBP appropriation. That is untrue. Any funds utilized for border barrier construction pursuant to § 2808 or § 284 will be used for the purpose for which they were appropriated—military construction and counter-drug activities, respectively—and consistently with their underlying statutes, not to increase funding for a CBP program, project, or activity as proposed in the President's budget request. The mere fact that appropriations to different agencies can be used for similar purposes does not transform a valid use of one source of appropriated funds into an improper expenditure simply because another agency may request funds for a similar purpose. The use of funds at issue here complies with § 739, and Plaintiffs have not stated a claim for violation of the CAA.

E. **Section 8005**

Plaintiffs assert that DoD's transfer of funds under section 8005 is unlawful because it is (1) not "based on unforeseen military requirements," (2) the item requested had already been "denied by Congress," and (3) the transfer was not "for military functions (except military construction)." Pls.' MSJ at 46–48. But none of these arguments has merit.[20]

First, Plaintiffs argue that DoD violated § 8005's requirement that transfers be for "higher priority items, based on unforeseen military requirements," because the situation at the southern border is not "unforeseen." Pls.' MSJ at 47. But § 8005 uses the term "unforeseen" in the context of the budgeting process. Congress does not appropriate funds to DoD on a "line item basis," and § 8005 gives DoD authority to make "changes in the application of financial resources from the purposes originally contemplated and budgeted for, testified to, and described in the justifications submitted to congressional committees in support of budget requests." H. Rep. No. 93-662, at 15–16. Here, the need for DoD to exercise its § 284(b)(7) authority did not arise until February 2019, when DHS requested support from DoD to construct fencing in drug trafficking corridors. *See* 10 U.S.C. § 284(a)(1) (authorizing DoD to support counter-drug activities only once "such support is requested"). Accordingly, the need to provide support for these projects was an unforeseen military requirement at the time of the President's fiscal year 2019 budget request. *See* Rapuano Decl., Ex. C,

[20] In *Sierra Club v. Trump*, the U.S. District Court for the Northern District of California entered a preliminary injunction prohibiting further action to construct the El Paso Sector project at issue in this case. The court concluded that DoD had not satisfied two of § 8005's requirements, holding that DoD had transferred funds for an "item" that was previously "denied" by Congress and that supported a military requirement that was not "unforeseen." *See* 2019 WL 2247689, at *18–21. The Court's rationale was that, at the time of DoD's appropriation, the Executive Branch's general desire for border-wall funding was foreseen and Congress denied DoD funding by providing DHS a smaller amount of funding than it originally requested from Congress. *See id.* But that reasoning considers the appropriations process at far too high a level of generality in light of § 8005's text and context. Under § 8005, an "item for which funds are requested" is a particular budget item requiring additional funding beyond the amount in the DoD appropriation for the fiscal year. And Congress's decision to appropriate less money to DHS cannot be a denial to DoD of its preexisting § 284 authority

at 1-2. And it remained an unforeseen military requirement through Congress's passage of DoD's fiscal year 2019 budget in September 2018, which was five months *before* DHS's request. *See* Pub. L. No. 115-245, 132 Stat. 2981. DoD's need to provide counter-drug assistance under § 284 in response to DHS's request was thus not accounted for in DoD's fiscal year 2019 budget and is accordingly "based on unforeseen military requirements" for purposes of § 8005.

Second, Congress has not "denied" any request by DoD to fund "the item" referenced in the transfer—namely counter-drug activities funding, including fence construction, under § 284. Plaintiffs assume that § 8005 can refer to a legislative judgment concerning the appropriation of funds for a different agency under different statutory authorities. But Congress's affirmative appropriation of $1.375 billion to CBP for the construction of "primary pedestrian fencing" in the Rio Grande Valley Sector, Pub. L. 116-6, div. A, § 230, does not constitute a "denial" of appropriations to DoD for its counter-drug activities in furtherance of DoD's mission under § 284. The statutory language of § 8005 is located in, and directed to, DoD's appropriations, and nothing in the DHS appropriations statute indicates that Congress "denied" a request to fund DoD's statutorily authorized counter-drug activities, which include fence construction 10 U.S.C. § 284(b)(7). Nor did Congress otherwise restrict the use of available appropriations for that purpose. *See* CAA, Pub. L. No. 116-6. Section 8005 was installed to ensure that DoD would not transfer funds for budget items that "ha[d] been *specifically deleted* in the legislative process." H.R. Rep. No. 93-662, at 16 (emphasis added). And because Congress never denied DoD funds to undertake the § 284 projects at issue, Plaintiffs' claims fail.

Third, Plaintiffs argue that border fencing cannot be built using funds transferred pursuant to § 8005 because the statute "does not authorize transferring funds for 'military construction.'" But that overstates the scope and application of the "military construction" exception in § 8005. The text of § 8005 lists the two types of "funds" and "appropriations" that may be transferred: 1) "working capital funds" or 2) "funds made available in this Act" (*i.e.*, the DoD FY19 Appropriations Act) "for

military functions (except military construction)." There is no violation of § 8005 here because neither the surplus Army personnel funds from which the original $1 billion was transferred, nor the counter-narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, to which the funds were transferred, constitute military construction funds. *See* Pub. L. No. 115-245, title I (military personnel appropriation); title VI (Drug Interdiction and counter-drug activities appropriation); *see also* Rapuano 4/25/19 Decl. ¶ 5, Ex. D (notice to Congress explaining in detail the sources of funds transferred between appropriations). Nor is there a contradiction between § 8005 and the definition of "military construction" for purposes of § 2808. In the context of § 8005, "military construction" is a term of art that generally refers to the Military Construction and Veterans Affairs budget (also known as the MILCON budget). Congress has previously allowed DoD to use § 8005 to transfer funds for use under its § 284 authority and to provide support for activities on the southern border.[21] Congress's failure to object to these transfers belies the claim that DoD cannot transfer funds under § 8005 while asserting that border barrier projects also constitute "military construction" under § 2808.

V. Plaintiffs' Appropriations Clause Claims Must Be Dismissed (Counts III–IV).

Plaintiffs also seek to challenge the Government's plan for funding border barrier construction under the Appropriations Clause. But these counts merely recast statutory claims in constitutional terms, and "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton*, 511 U.S. at 473. The Government is not relying on independent Article II authority in order to undertake border construction; the actions alleged are being undertaken pursuant to statutory authority alone. The President did not seek to reallocate appropriated funds

[21] *See* Reprogramming Application & Congressional Approvals, Sept. 2007 (Ex. 9) (DoD infrastructure project in Nicaragua pursuant to § 284 authority); Reprogramming Application & Congressional Approvals, Sept. 2006 (transferring funds to support the National Guard's involvement in Operation Jump Start, the DoD mission in 2006-08 to support CBP's border security efforts, which included construction efforts by the National Guard) (Ex. 10); *see also* Joint Statement of Rood and Gilday (describing Operation Jump Start and National Guard's role in "building more than 38 miles of fence") (Ex. 4).

based upon any claim of inherent constitutional authority. Nor did the President claim that the declaration of a national emergency gave him any authority that had not been expressly conferred by Congress. Rather, the Government relies solely upon available statutory authorities—31 U.S.C. § 9705, 10 U.S.C. § 284, and 10 U.S.C. § 2808—that Congress has delegated to the Executive Branch. The outcome of this case thus turns entirely on whether the statutes authorize or proscribe the Government's action.

In *Dalton*, the Supreme Court rejected the proposition that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." 511 U.S. at 471. The Court recognized that the "distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Id.* at 474. By asserting that actions allegedly exceeding statutory authority are, for that reason alone, violations of the Appropriations Clause, Plaintiffs' complaint does what the Court disapproved of in *Dalton*. Plaintiffs assert no violation of the Appropriations Clause separate from alleged statutory violations. *See* First Am. Compl. ¶¶ 134–55 (describing violations of the CAA, the NEA, § 284, § 2808, and § 8005). These allegations do not state constitutional claims. *See Dalton*, 511 U.S. at 473–74.

Plaintiffs do not allege that the President has exercised his inherent authority under Article II of the Constitution. Nor does the President purport to do so. Despite Plaintiffs' allusions to President Truman's seizure of steel mills during the Korean War, First Am. Compl. ¶ 5, this case stands in sharp contrast to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the President's order to the Secretary of Commerce rested solely upon "the aggregate of his powers under the Constitution," thereby conceding a lack of statutory authority. *Id.* at 585–87. The Court held the action unconstitutional. *Id.* at 589. In his concurrence, Justice Jackson emphasized that the President had acted in the absence of congressional authorization, where his "power is at its lowest ebb" and such

exercise of power must be "scrutinized with caution." *Id.* at 637–38 (Jackson, J. concurring). That is not the situation here. To the contrary, each action—including the Proclamation—is based on express statutory authority. The President and the executive agencies are acting "pursuant to an express . . . authorization of Congress," the situation in which "his authority is at its maximum." *Youngstown Sheet*, 343 U.S. at 635 (Jackson, J. concurring). *Youngstown* is therefore inapposite. *See AFLCIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc); *see also Dalton*, 511 U.S. at 473.

If Plaintiffs' allegations rise to the level of constitutional issues, then *any* allegation that the President or his agents exceeded their statutory authority could be pled as a constitutional or separation-of-powers claim. The Supreme Court has foreclosed such tactics, "distinguish[ing] between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Dalton*, 511 U.S. at 472. Once "the President concedes . . . that the only source of his authority is statutory, no constitutional question whatever is raised," and all constitutional claims should be dismissed. *Id.* at 474 n.6. (internal quotation marks omitted).[22]

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' complaint in full under Civil Rule 12, or grant summary judgment to the Government pursuant to Rule 56.[23]

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[22] Even if this Court were to determine that the Complaint stated a constitutional cause of action, challenges to the constitutionality of agency action must be brought pursuant to the APA. *See* 5 U.S.C. § 706(2)(B); *see also, e.g.*, *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237–38 (D.N.M. 2014) ("While a right to judicial review of agency action may be created by a . . . constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless *specifically* excluded."); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10–11 (D.R.I. 2004) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery.").

[23] Plaintiffs, in the alternative, request a preliminary injunction. Pls.' MSJ at 48–50. As explained in this brief, Plaintiffs have no likelihood of success on the merits of their claims, and cannot even establish Article III standing, let alone the sort of irreparable injury that would warrant a preliminary injunction. Moreover, the balance of equities tips sharply in the government's favor in light of the emergency situation at the border and the high levels of drug trafficking that prompted DHS to seek assistance from DoD pursuant to § 284.

Dated: June 10, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Michael J. Gerardi*
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